

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:)	
)	
Public Notice Changing Procedures for Auction)	Report No. AUC 02-44-G
No. 44 and Waiving Eligibility Requirements to Bid)	(Auction No. 44)
on Lower 700 MHz Band C and D Block Licenses)	

To: Chief, Wireless Telecommunications Bureau

PETITION FOR RECONSIDERATION

Spectrum Holdings I, LP (“Spectrum”), pursuant to § 405(a) of the Communications Act of 1934 (“Act”) and § 1.106(b)(1) of the Commission’s Rules (“Rules”), hereby requests the Wireless Telecommunications Bureau (“Bureau” or “WTB”) to rescind its waiver of § 1.2105(b)(2) of the Rules to permit bidders in Auction No. 44 to select licenses on which to bid in addition to those identified in their short-form applications, and its waiver of its publicly announced deadline for upfront payments to allow bidders to supplement their upfront payments. *See Auction No. 44 Revised Schedule, License Inventory, and Procedures*, DA 02-1491, at 5-7 (WTB June 26, 2002) (“*Auction 44 New Procedures PN*”). In support thereof, the following is respectfully submitted:

BACKGROUND

Auction 44 was to include 758 licenses for five frequency blocks in the 698-746 MHz (“Lower 700 MHz”) band. Blocks A, B and C were each to be 12 MHz of spectrum, consisting of a pair of 6 MHz segments; Blocks D and E would consist of 6 MHz of unpaired spectrum. Licenses for Blocks A, B, D, and E were to be offered in each of six regions called Economic Area Groupings (“EAGs”). Block C licenses for each of the 734 Cellular Market Areas (“CMAs”) were to be auctioned. *See Auction of Licenses in the 698-746 MHz Band Scheduled for June 19, 2002*, 17 FCC Rcd 4935, 4943 (WTB 2002) (“*Auction 44 Procedures PN*”).

The competitive bidding procedures to govern Auction 44 were adopted by the Commission in a notice and comment rulemaking that was completed on January 18, 2002. *See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (TV Channels 52-59)*, 17 FCC Rcd 2153, 2215-17 (2002) (“*Lower 700 Mhz Band Order*”). The Commission decided to use the general competitive bidding rules set forth in Part 1 of the Rules. *See id.* at 2215.

On January 24, 2002, the WTB asked for public comments on a variety of procedural issues specific to Auction 44. *See Auction of Licenses in the 698-746 MHz Band Scheduled for June 19, 2002*, DA 02-200, at 2 (WTB Jan. 24, 2002) (“*Auction 44 Comment PN*”). On March 20, 2002, the WTB issued its *Auction 44 Procedures PN*, which listed the licenses to be auctioned at Auction 44 and set forth the pre-auction, auction, and post-auction procedures that would apply. In particular, the WTB announced auction-specific procedures, including the minimum opening bids, upfront payments, pre-auction deadlines, and other requirements for participation in Auction 44. *See Auction 44 Procedures PN*, 17 FCC Rcd at 4951-64.

Short-form (FCC Form 175) applications to participate in Auction 44 were filed on May 8, 2002; upfront payments were made by the applicants on May 30, 2002. On June 7, 2002, the WTB identified 128 applicants found to be qualified to bid in Auction 44 subject to the list of licenses selected on their FCC Forms 175 and the amount of their upfront payments. *See Auction of Licenses for 698-746 MHz Band*, DA 02-1346, at Attach. A (WTB June 7, 2002) (“*Auction 44 Qualified Bidders PN*”). For each qualified applicant, the WTB specified the amount of its upfront payment, its maximum eligibility in bidding units, and the licenses it selected on its short-form application. *See id.* at Attachs. A, B.

Auction 44 was scheduled to begin on June 19, 2002. On that date, the President signed the Auction Reform Act of 2002 (“Auction Reform Act”), which added a new paragraph 15 to § 309(j)

of the Act. *See* Auction Reform Act § 3(a). By the provisions of § 309(j)(15), Congress mandated that the Commission was not to “commence or conduct” Auction 44 on June 19, 2002. 47 U.S.C. § 309(j)(15)(B). Congress terminated Auction 44 with the exception of the auction of the C and D Block licenses. *See id.* § 309(j)(15)(C)(i). It directed that the auction of those licenses commence no earlier than August 19, 2002 and no later than September 19, 2002. *See id.* § 309(j)(15)(C)(iii). Finally, Congress limited the bidders eligible to participate in the C and D Block to the “entities that were qualified entities” in the original Auction 44 and had filed short-form applications by the May 8, 2002 deadline. *Id.* § 309(j)(15)(C)(ii).

Congress provided that by July 19, 2002, “the Commission shall return to the bidders for licenses in the A-block, B-block, and E-block of auction 44 the full amount of all upfront payments made by such bidders for such licenses. *Id.* § 309(j)(15)(D).

One week after the Auction Reform Act was signed into law, the WTB issued its *Auction 44 New Procedures PN*. The WTB rescheduled Auction 44 for August 27, 2002. However, without seeking public comment, the WTB changed procedures under which applicants had already filed their short-form applications, made their upfront payments, and established their maximum eligibility.

Purportedly because qualified bidders could not have “anticipated” the changes in Auction 44 mandated by the Auction Reform Act, which *decreased* the number of Lower 700 MHz band licenses to be auctioned, the WTB granted a blanket waiver of § 1.2105(b)(2) of the Rules to permit a qualified bidder to *increase* the number of licenses on which it could bid. *See Auction 44 New Procedures PN*, at 5 & n.16. Allegedly for the same reason, the WTB waived its May 30, 2002 deadline for submitting upfront payments so that bidders can “supplement their existing upfront payments to purchase additional bidding eligibility.” *Id.* at 6.¹ The WTB opened a five-day window

¹The deadline for submitting upfront payments originally was May 28, 2002. *See Auction 44 Procedures PN*, 17 FCC Rcd at 4951. On May 24, 2002, four days prior to the original deadline, the WTB extended the deadline to May 30, 2002. *See Auction of Licenses for 698-746 MHz Band*, DA 02-1213, at 1 (May 24, 2002).

between July 22, 2002 and July 26, 2002 in which bidders could select additional licenses and supplement their upfront payments. *See id.* at 6, 7.

The WTB also limited the statutory right of qualified bidders eligible to bid on A, B, or E Block licenses to obtain a full refund of their upfront payments for such licenses by July 19, 2002.

To obtain their refunds, qualified bidders must request their refunds by electronic mail no later than 6:00 p.m. ET on July 3, 2002. *See id.* at 3-4.

STANDING

Spectrum selected all EAG and CMA licenses in its timely-filed short-form application. It wire transferred an upfront payment of \$40 million by the May 30, 2002 deadline. Having complied with the Part 1 eligibility requirements, and the auction-specific eligibility requirements announced by the *Auction 44 Procedures PN*, Spectrum was found qualified and eligible to bid on A, B, C, D or E Block licenses in the originally scheduled Auction 44. *See Auction 44 Qualified Bidders PN*, Attach. A at 6, Attach. B at 24. With a maximum eligibility of 40,000,000 bid units, Spectrum had sufficient eligibility to bid simultaneously on 12 MHz of spectrum (i.e., either the A, B, or C Block license, or both the D and E Block licenses) covering the entire nation.² Only one other applicant (Council Tree Wireless, L.L.C.) was eligible to bid on a nationwide block of spectrum.

As an eligible bidder in Auction 44, Spectrum has standing as a party to the proceeding to seek reconsideration of the Bureau's unlawful retroactive changes to the initial Auction 44 rules and procedures. *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(b)(1). Moreover, Spectrum's interests in participating in a fair and valid auction have been adversely affected by the WTB's actions.

²The minimum upfront payment required for eligibility to bid on a 12 MHz block of spectrum nationwide was \$37,884,000.

As a result of the WTB's retroactive changes in the Auction 44 eligibility requirements, Spectrum is facing the uncertain prospect of participating in an invalid auction against additional bidders for C and D Block licenses, who were handed an unprecedented, post-deadline opportunity to obtain additional bid units. Also, and more seriously, the WTB's actions, the resultant uncertainty, and the prospect of litigation, will impair Spectrum's ability to attract and retain investors. As things stand now, investors would have cause to be concerned that a court challenge could invalidate the auction itself, thereby putting their investment at risk even if Spectrum is an auction winner. Such adverse affects constitute cognizable injury for the purposes of standing.

A bidder in an FCC auction has a right to a "legally valid" bidding process; "a party allegedly deprived of that right asserts a cognizable injury." *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 605 (D.C. Cir. 2002). In particular, a bidder has standing to claim that auction rule revisions "constitute impermissibly retroactive changes to the initial auction rules." *U.S. Airwaves v. FCC*, 232 F.3d 227, 232 (D.C. Cir. 2000). Thus, Spectrum has standing to challenge the after-the-fact changes in the Auction 44 procedures announced by the WTB.

ARGUMENT

I. THE WTB VIOLATED THE NOTICE AND COMMENT REQUIREMENTS OF § 309(j)(3)(E) OF THE ACT

"We start from the intuitive premise that an agency cannot, in fairness, radically change the terms of an auction after the fact." *U.S. Airwaves*, 232 F.3d at 235. That premise is explicitly expressed in § 309(j)(3)(E) of the Act.

Congress directed the Commission to adopt safeguards to ensure that, in scheduling any auction, an "adequate period" would be allowed: (1) before the issuance of auction rules, to permit notice and comment on proposed auction procedures; and (2) after issuance of auction rules, to

afford interested parties “sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment.” 47 U.S.C. § 309(j)(3)(E). In short, bidders must be afforded prior notice of the auction rules and procedures.

The Commission both recognized and complied with the pre-auction rulemaking requirements of § 309(j)(3)(E) of the Act, when it decided that the Part 1 competitive bidding rules would govern the Lower 700 MHz band auction. *See Lower 700 Mhz Band Order*, 17 FCC Rcd at 2215. The Commission’s decision to adopt those rules was deemed consistent with its ongoing effort to streamline the auction rules for all radio services, increase the efficiency of the auction process, and “provide more specific guidance to auction participants.” *Id.* at 2215 & n.461 (quoting *Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures*, 13 FCC Rcd 374, 376 (1997)). And the Commission noted the WTB’s obligation to comply with the notice and comment requirements § 309(j)(3)(E):

[C]onsistent with statutory obligations, WTB will seek comment on auction-related procedural issues, including auction design, prior to the start of the Lower 700 Mhz auction pursuant to WTB’s existing delegated authority. This will provide WTB with the opportunity to weigh the benefits and disadvantages of any particular bidding design, among other auction-specific issues (e.g. minimum opening bids), prior to the start of the Lower 700 MHz Band auction. We are confident that WTB will take concerns like those raised by [commenting parties] into account when it makes future determinations about the appropriate competitive bidding procedures to be used to auction Lower 700 MHz Band licenses.³

The WTB in turn explicitly recognized both the Commission’s and its obligations under § 309(j)(3)(E) of the Act when it solicited public comments on procedural issues relating to Auction 44. *See Auction 44 Comment PN*, at 2 (quoting 47 U.S.C. § 309(j)(3)(E)(i)). The WTB correctly

³*Lower 700 Mhz Order*, 17 FCC Rcd at 2217 (footnotes omitted).

noted:

Consistent with the provisions of the Balanced Budget Act of 1997 and to ensure that potential bidders have adequate time to familiarize themselves with the specific rules that will govern the day-to-day conduct of an auction, the Commission directed the Bureau, under its existing delegated authority, to seek comment on a variety of auction-specific procedures prior to the start of each auction.⁴

The WTB solicited comments on its proposal that “the amount of the upfront payment submitted by a bidder will determine the bidding units on which a bidder may place bids.” *Id.* at 3.

In describing its proposal, the WTB stressed:

⁴ *Auction 44 Comment PN*, at 2 (footnotes omitted).

Eligibility cannot be increased during the auction. Thus, in calculating its upfront payment amount, an applicant must determine the *maximum* number of bidding units it may wish to bid on (or hold high bids on) in any single round, and submit an upfront payment covering that number of bidding units. We seek comment on this proposal.⁵

After considering twenty-two sets of comments, the WTB announced the procedures that would apply to Auction 44. *See Auction 44 Procedures PN*, 17 FCC Rcd at 4938. The WTB set the deadlines for the filing of short-form applications and for submitting “sufficient” upfront payments. *Auction 44 Procedures PN*, 17 FCC Rcd at 4951. It warned applicants that § 1.2105 of the Rules prohibited them from changing “their license selections or proposed service areas” after the short-form filing deadline. *Id.* at 4958 (citing 47 C.F.R § 1.2105). The WTB also advised:

Applicants should select all licenses on which they want to be eligible to bid in the auction. Be advised that there is no opportunity to change this list once the short-form filing deadline passes on May 8, 2002. It is critically important that you confirm the licenses that you have selected because the Automated Auction System will not accept bids for which an applicant has not applied on its FCC Form 175.⁶

Finally, when announcing that it had adopted its proposal for calculating upfront payment

⁵*Auction 44 Comment PN*, at 2 (footnotes omitted) (emphasis in original).

⁶*Auction 44 Procedures PN*, 17 FCC Rcd at 4994.

amounts, the WTB emphasized “*there is no procedure for increasing a bidder’s maximum eligibility after the upfront payment deadline.*” *Auction 44 Procedures PN*, 17 FCC Rcd at 4962.

After notifying potential applicants that it would abide by § 1.2105(b)(2) of the Rules, and after publicly adopting a procedure under which applicants could not increase their maximum eligibility to bid in Auction 44 after May 30, 2002, the WTB reversed itself - - after Auction 44 eligibility had been frozen by Congress - - and simply announced that it would not obey § 1.2105(b)(2) and that it would permit applicants to increase their maximum eligibility during a five-day window ending on July 26, 2002. *See Auction 44 New Procedures PN*, at 5-7. The retroactive change in the auction rules and procedures by the WTB is unlawful on several grounds, not least of which is that § 309(j)(3)(E) of the Act prohibits retroactive auction rule changes by agency fiat.

The WTB publicly acknowledged that § 309(j)(3)(E)(i) mandates that auction rules and procedures be issued *after* an adequate period for notice and comment, and that § 309(j)(3)(E)(ii) requires that bidders have “adequate time to familiarize themselves” with the auction rules “prior to the start of each auction.” *Auction 44 Comment PN*, at 2. Knowing that, the WTB nevertheless waived its properly promulgated May 8, 2002 and May 30, 2002 deadlines for establishing maximum eligibility, and it did so both after the deadlines had passed and without prior notice and comment. Not only that, the WTB abrogated requirements for establishing eligibility after 128 bidders had relied on, and complied with, those requirements to establish their maximum eligibility. Such *ad hoc*, retroactive changes in Auction 44 procedures violated § 309(j)(3)(E) of the Act.

II. THE WTB VIOLATED THE AUCTION REFORM ACT

The WTB claims that it revised the “schedule, license inventory, and procedures” for Auction 44 in order to comply with the Action Reform Act. *Auction 44 New Procedures PN*, at 1.

However, § 3 of the Auction Reform Act required Auction 44 to be rescheduled and reduced the license inventory, but it did not authorize the procedural changes effected by the WTB.

The determination of whether the WTB contravened the Auction Reform Act, now § 309(j)(15) of the Act, is appropriately made using the familiar two-step analysis of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *See, e.g., GTE Service Corp. v. FCC*, 224 F.3d 768, 771 (D.C. Cir. 2000). *Chevron* step one requires a determination of “whether Congress has directly spoken to the precise question at issue.” 467 U.S. at 842. If so, “that is the end of the matter;” for the WTB “must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43.

Under the *Chevron* framework, “the traditional tools of statutory construction” are employed “to determine whether Congress has spoken to the precise question at issue.” *National Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995). To determine its plain meaning, new § 309(j)(15) must be read together with the other provisions of § 309(j) so as “to give effect, if possible, to every provision.” *Stone v. INS*, 514 U.S. 386, 397 (1995). *See Halverson v. Slater*, 129 F.3d 180, 184-85 (D.C. Cir. 1997). Such a reading of § 309(j)(15) is required by its own terms, because the authority conferred on the Commission by § 3(a) of the Auction Reform Act to determine the “timing” of auctions is limited by the other provisions of § 309(j):

*Subject to the provisions of this subsection (including paragraph (11)) . . . the Commission shall determine the timing of and deadlines for the conduct of competitive bidding under this subsection, including the timing of and deadlines for qualifying for bidding; conducting auctions; collecting, depositing, and reporting revenues; and completing licensing processes and assigning licenses.*⁷

⁷47 U.S.C. § 309(j)(15)(A) (emphasis added).

Congress made the Commission's authority to determine the timing of auctions subject to the scheduling provisions of § 309(j)(3)(E), including the "adequate" prior notice requirements of that subsection. In particular, the Commission's authority to determine the "timing of and deadlines for qualifying for bidding" was subject to the explicit directive of new § 309(j)(15)(C)(ii), in addition to the prior notice requirements of § 309(j)(3)(E). That directive provides:

The entities that shall be eligible to bid in the auction of the C-block and D-block licenses . . . shall be those entities that were qualified entities, and that submitted applications to participate in auction 44, by May 8, 2002, as part of the original auction 44 short form filing deadline.⁸

When read together, and given effect, §§ 309(j)(3)(E), 309(j)(15)(A) and 309(j)(15)(C)(ii) plainly prohibit the WTB from retroactively changing, without prior notice and comment, the auction procedures, including the "deadlines for qualifying for bidding," under which 128 applicants filed their short-form applications and *were* found to be "qualified entities" to bid on the C and D Block licenses in the original Auction 44. In particular, the WTB was not authorized to abrogate the May 8, 2002 short-form filing deadline, or waive § 1.2105(b)(2) of the Rules, to allow applicants to be eligible to bid on additional licenses not listed in their short-form applications. Nor was it authorized to simply announce (and retroactively apply) a new procedure "*for increasing a bidder's maximum eligibility after the upfront payment deadline,*" when no such procedure existed at the time 128 applicants were found to be qualified entities to bid on the C and D Block licenses. *Auction 44 Procedures PN*, 17 FCC Rcd at 4962 (emphasis in original).

"If employment of an accepted canon of construction illustrates that Congress had a *specific* intent on the issue in question, then the case can be disposed under the first prong of *Chevron*."

⁸47 U.S.C. § 309(j)(15)(C)(ii).

Michigan Citizens for Indep. Press v. Thornburgh, 868 F.2d 1285, 1292-93 (D.C. Cir. 1989) (emphasis in original). Here, an accepted canon of construction illustrates that, when it enacted the Auction Reform Act, Congress had the specific intent that Auction 44 be rescheduled and the “license inventory” be limited to C and D Block licenses, but that no changes be made in the procedures under which eligibility to bid on those licenses had already been established.

The WTB apparently believes “it possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area.” *Railway Labor Executive’s Ass’n v. National Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994) (*en banc*). That notion has been “categorically reject[ed]” by the courts. *Id.* It should be similarly disavowed by the WTB.

An “agency’s power is no greater than that delegated to it by Congress.” *Lyng v. Payne*, 476 U.S. 926, 937 (1986). Congress delegated some authority to the Commission with respect to Auction 44, but that authority did not confer power on the WTB to change the maximum eligibility of Auction 44 bidders as already established under existing law. Therefore, the procedural changes announced by the *Auction 44 New Procedures PN* are invalid. *See Heckler v. Chaney*, 470 U.S. 821, 833 (1983) (agencies are not “free to disregard legislative direction in the statutory scheme that the agency administers”); *United States v. Larionoff*, 431 U.S. 864, 873 (1977) (“regulations, in order to be valid, must be consistent with the statute under which they are promulgated”).

III. THE WTB VIOLATED THE ACCARDI DOCTRINE

The *Accardi* doctrine holds that government agencies are bound to follow their own rules, even self-imposed procedural rules that limit otherwise discretionary decisions. *See Accardi v. Shaughnessy*, 347 U.S. 260, 267-28 (1954); *Wilkinson v. Legal Services Corp.*, 27 F. Supp. 2d 32,

34 n.3 (D.D.C. 1998). The doctrine obviously applies to the Commission. *See, e.g., Adams Telecom, Inc. v. FCC*, 38 F.3d 576, 582 (D.C. Cir. 1994). The doctrine applies more forcefully to a subordinate authority, such as the WTB.

Under the *Accardi* doctrine, the WTB was bound to abide by § 1.2105(b)(2) of the Rules, so long as the rule remained in effect. *See Service v. Dulles*, 354 U.S. 363, 388 (1957) (“so long as the [r]egulations remained unchanged,” an agency cannot “proceed without regard to them”). Adherence to § 1.2105(b)(2) of the Rules was especially necessary after the WTB publicly announced (after notice and comment) that it would enforce the rule. *See Auction 44 Procedures PN*, 17 FCC Rcd at 4958, 4994.

The *Accardi* doctrine also requires the WTB to adhere to its “established and announced procedures.” *Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976). Having announced (after notice and comment) a procedure under which bidders could not increase their maximum eligibility after the May 30, 2002 upfront payment deadline, *see Auction 44 Procedures PN*, 17 FCC Rcd at 4962, the WTB was bound to follow its procedure until the procedure is validly amended or rescinded. And because it was adopted pursuant to the notice and comment requirement of § 309(j)(3)(E)(i) of the Act, the procedure can be validly amended or repealed only pursuant to notice and comment. *See Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998).

“[I]t is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned.” *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986). As shown below, the WTB departed from a Commission rule and its own procedure, as well as the deadlines it set for compliance with each, for no discernible purpose, much less to achieve a laudable aim. Regardless of its motivation, the WTB’s

ad hoc departure from Auction 44 procedures was unlawful.

IV. THE WAIVER OF AUCTION 44 PROCEDURES WAS UNLAWFUL

Because Congress did not authorize the Commission to permit any change in the maximum eligibility of Auction 44 bidders, the WTB was not empowered to permit such a change *sua sponte* by issuing post-deadline “waivers.” *See Auction 44 New Procedures PN*, at 5-7. Moreover, the waivers announced by the WTB are wholly inconsistent with the Commission’s waiver rules and policies.

Except in extraordinary circumstances, the Commission will not entertain post-deadline requests for waivers of payment deadlines, *see 21st Century Telesis, Inc.*, 15 FCC Rcd 25113, 25116 (2000), and upfront payment deadlines have been waived only in cases where the applicant “can demonstrate that the failure to make the payment by the established deadline was due to circumstances outside its control.” *Id.* at 25121-22. Here, the WTB granted a waiver of the upfront payment deadline on its own post-deadline motion, and did so with respect to applicants that had already made their upfront payments by the deadline.

The Commission will not waive an auction rule unless the waiver request meets at least one “element of the two-pronged waiver standard” of § 1.925 of the Rules. *Id.* at 2513 & n.62. In this case, the WTB issued an unrequested waiver of § 1.2105(b)(2) of the Rules, and its May 8, 2002 short-form filing deadline, after full compliance with the rule had been achieved and the filing deadline had been met. Hence, a waiver was unnecessary under the first prong of the § 1.925(b)(3) waiver standard, since the “underlying purpose” of the rule had already been served. 47 C.F.R. § 1.925(b)(3)(i). The waiver was equally unnecessary under the second prong of the standard. Since the applicants had complied with the rule and met the deadline, application of the rule and

enforcement of the deadline would hardly have been “inequitable, unduly burdensome or contrary to the public interest.” *Id.* § 1.925(b)(3)(ii). Thus, under the two-pronged waiver standard, the WTB waived a rule needlessly.

Certainly, it is no justification for the WTB to claim that new procedures were necessary “because qualified bidders could not have anticipated the statutorily mandated changes in Auction No. 44 at the time they submitted their original license selections,” *Auction 44 New Procedures PN*, at 5, or “at the time they submitted their original upfront payments.” *Id.* at 6. The qualified bidders clearly anticipated on May 8, 2002 and May 30, 2002 that their maximum eligibility would remain unchanged. The Auction Reform Act did not disturb those expectations: it mandated that the maximum eligibility of the qualified bidders remain unchanged. *See* 47 U.S.C. § 309(j)(15)(C)(ii).

The statutorily mandated changes in Auction 44 will not impact those bidders eligible to bid on C and D Block licenses for they can still bid on those licenses. Bidders eligible to bid on A, B and E Block licenses can bid on D Block licenses or they can obtain a full refund of their upfront payments. *See id.* § 309(j)(15)(D). Thus, the Auction Reform Act provided no solid ground on which the WTB could grant waivers or otherwise depart from its procedures to permit supplemental license selections and upfront payments.

V. THE WTB UNREASONABLY INFRINGED ON THE
STATUTORY RIGHT TO RECEIVE REFUNDS

Congress spoke directly and clearly on the subject of upfront payment refunds: “Within one month after the date of enactment of this paragraph, the Commission shall return to the bidders in the A-block, B-block, and E-block of auction 44 the full amount of all upfront payments made by such bidders for such licenses.” 47 U.S.C. § 309(j)(15)(D). Thus, the Commission has the statutory duty to refund upfront payments by July 19, 2002, and the eligible bidders have the corresponding

right to receive such refunds by that date. Spectrum is among only six bidders eligible to request refunds. *See Auction 44 New Procedures PN*, at 3 n.12. Nevertheless, the WTB announced that the six bidders can only exercise their right to receive refunds if they request their refunds electronically by 6:00 p.m. ET on July 3, 2002. *See id.* at 3. That restriction on the bidders' right to receive refunds is wholly unjustified.

It is inconceivable that the Commission needs sixteen days to wire refunds to no more than six bidders. It should not take more than two days at the most for the Commission to arrange for six wire transfers. Under such circumstances, the imposition of a July 3, 2002 deadline on Spectrum and the five other bidders entitled to receive refunds is an unwarranted and prejudicial infringement on their statutory rights. The current deadline does not afford Spectrum adequate time to assess whether it should maintain its current level of eligibility, request a partial refund, or depart Auction 44 and obtain a full refund of its \$40 million upfront payment. Accordingly, the WTB should extend its deadline to exercise the right to refunds under § 309(j)(15)(D) to 6:00 p.m. ET on July 16, 2002.⁹

CONCLUSION

The WTB's action will materially harm Spectrum. Having raised a substantial amount of venture capital for Auction 44, Spectrum's management must be able to properly advise its investor group of the potential risks involved in the auction process. Until now, management has been able to define and quantify risk to the satisfaction of investors.

The WTB's retroactive changes in the Auction 44 procedures have introduced a litigation

⁹The WTB need not extend the July 3, 2002 deadline for those who opt to depart Auction 44 and are not entitled to a refund under § 309(j)(15)(D). The WTB exercised its discretion when it afforded the opportunity to obtain refunds to bidders not eligible to bid on A, B or E Block licenses. Thus, the WTB also has the discretion to impose the July 3, 2002 deadline on refund requests of those bidders that are not entitled to refunds.

risk into the process that Spectrum's investors may find unacceptable. If substantial new money and new market selections come to the table, Spectrum may file a motion to stay the auction until the issues it has now raised can be resolved with finality.

Put simply, Spectrum has a right to have the auction conducted under the rules in effect as of June 19, 2002. If the auction goes forward without resolution of this issue, then Spectrum will be subjected to the risk that the auction results could become entangled in years of litigation while substantial funds are being held by the agency, without interest. The carrying cost of capital, the lost opportunity costs, the litigation costs, and the uncertainty surrounding the outcome of litigation, may be too much to bear, for even well-financed ventures. Spectrum can imagine no worse outcome for this auction than for the Auction 35 reauction debacle to be replayed.

For all the foregoing reasons, Spectrum respectfully requests the WTB to promptly reconsider and rescind: (1) its waiver of § 1.2105(b)(2) of the Rules and its May 8, 2002 short-form filing deadline; (2) its waiver of its May 30, 2002 upfront payment deadline; and (3) its July 3, 2002 deadline for requesting refunds as a matter of right under § 309(j)(15)(D) of the Act.

Respectfully submitted,

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